

NORIMAH MOHAMED & ORS

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v.

BUKIT LENANG DEVELOPMENT SDN BHD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

HAIDAR MOHD NOOR JCA

AZMEL MAAMOR J

[CIVIL APPEALS NO: J-02-178-99 & J-02-68-99 & J-02-205-99]

4 APRIL 2000

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CIVIL PROCEDURE: *Summary judgment - Summary possession of land - Whether resolution under summary jurisdiction inappropriate - Whether there were triable issues - Rules of the High Court 1980, O. 89 - Applicability*

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The appellants were the occupiers of a piece of land owned by Oakfield Enterprise Sdn Bhd ('Oakfield'). Oakfield took the view that the appellants were squatters and in 1989 it applied for and obtained summary possession of the land under O. 89 Rules of the High Court 1980 ('the RHC'). Having obtained the order for possession, Oakfield, however, did not execute the order, but proceeded instead to collect RM3,000 from each of the appellants. In March 1996, Oakfield sold the land to the respondent. It was not in dispute that the respondent took the land without vacant possession and with full knowledge of the presence of the appellants thereon. That notwithstanding, upon obtaining the title, the respondent instituted proceedings for summary recovery of possession under O. 89 RHC. The learned judge held that the appellants were squatters, that this was an appropriate case for the application of O. 89, and that the respondent was therefore entitled to an order for possession. The appellants appealed and argued that the learned judge was wrong in ruling the way she did. According to the appellants, O. 89 could not apply as the case was riddled with triable issues, such as: (i) whether the appellants had acquired an interest in the lands; (ii) whether that interest could bind the respondent; (iii) whether on the facts the respondent could be placed in a better position than Oakfield; and (iv) whether Oakfield was guilty of any breach of fiduciary duty when negotiating with the appellants.

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a Held:
Per Gopal Sri Ram JCA

b [1] There is much force in the submissions of the appellants. The issues identified by the appellants constitute triable issues that are wholly inappropriate for resolution under summary jurisdiction which O. 89 RHC confers.

c [2] The appellants, whatever their legal position may be before 1994, appear *ex facie* to have entered into a transaction with the respondent's predecessor in title. In the context of s. 26(b) of the Specific Relief Act, 1950, and since the respondent had taken title with express knowledge, the appellants might be able to argue that the respondent is equally bound by any contract that may have been entered between the appellants and Oakfield. Clearly, the respondent's right to immediate possession is under a cloud, and that being so the case is entirely unsuitable to be dealt with summarily under O. 89 RHC.

d [Appeal allowed.]

[Bahasa Malaysia Translation Of Headnotes]

e Perayu-perayu merupakan penghuni-penghuni sebidang tanah yang dimiliki oleh Oakfield Enterprise Sdn Bhd ('Oakfield'). Oakfield berpendapat bahawa perayu-perayu adalah setingan dan pada tahun 1989 ianya telah memohon dan memperolehi milikan terus akan tanah tersebut di bawah A. 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Setelah memperolehi perintah untuk milikan, Oakfield, walaupun bagaimanapun, tidak menyempurnakan perintah tersebut, tetapi sebaliknya telah mengutip RM3,000 daripada setiap seorang perayu-perayu. Dalam bulan Mac 1996, Oakfield telah menjual tanah tersebut kepada responden. Ianya tidak dipertikaikan bahawa responden telah mengambil tanah tersebut tanpa milikan kosong dan dengan pengetahuan penuh akan kehadiran perayu-perayu di atasnya. Meskipun begitu, setelah memperolehi hakmilik, responden telah memulakan prosiding untuk mendapatkan semula milikan di bawah A. 89 KMT. Hakim yang bijaksana memutuskan bahawa perayu-perayu adalah setingan, bahawa ini merupakan kes yang wajar untuk permohonan dibawah A. 89, dan bahawa responden adalah dengan itu berhak kepada satu perintah untuk pemilikan. Perayu-perayu merayu dan berhujah bahawa hakim yang bijaksana telah bertindak salah dalam memutuskan sepertimana yang telah dilakukan olehnya. Menurut perayu-perayu A. 89 tidak boleh dipakai kerana kes tersebut dipenuhi dengan isu-isu yang boleh dibicarakan, seperti (i) samada perayu-perayu telah memperolehi kepentingan dalam tanah-tanah tersebut; (ii) samada

kepentingan itu boleh mengikat responden; (iii) samada berdasarkan fakta-fakta responden boleh diletak pada kedudukan yang lebih baik daripada Oakfield; dan (iv) samada Oakfield bersalah kerana kemungkiran kewajipan fidusiari ketika berunding dengan perayu-perayu. a

Diputuskan:
Oleh Gopal Sri Ram HMR b

[1] Penghujahan perayu-perayu adalah menyakinkan. Isu-isu yang dikenalpasti oleh perayu-perayu membentuk isu-isu boleh dibicarakan dan adalah tidak berpatutan untuk penyelesaian di bawah bidangkuasa terus dibawah A. 89 KMT. c

[2] Perayu-perayu, apapun kedudukan mereka yang mungkin disisi undang-undang sebelum tahun 1994, kelihatan *ex facie* telah memasuki satu transaksi dengan pemilik terdahulu. Dalam konteks s. 26(b) Akta Relief Spesifik 1950, dan oleh kerana responden telah mengambil hakmilik dengan pengetahuan nyata, perayu-perayu mungkin dapat berhujah bahawa responden adalah terikat oleh mana-mana kontrak yang mungkin telah dimasuki antara perayu-perayu dan Oakfield. Jelasnya, hak responden kepada pemilikan serta-merta adalah kabur, dan oleh yang demikian kes ini adalah tidak sesuai untuk diuruskan secara terus di bawah A. 89 KMT. d

[Rayuan dibenarkan.] e

Case(s) referred to:
Bohari Taib & Ors v. Pengarah Tanah Galian Selangor [1991] 1 CLJ 647 (foll)
Krishnadas & Ors v. Maniyam [1997] 1 CLJ 636 (refd)
Ong Chat Pang & Anor v. Valiappa Chettiar [1971] 1 MLJ 224 (refd) f
Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor [1999] 1 CLJ 74 (refd)

Legislation referred to:
Rules of the High Court 1980, O. 89
Specific Relief Act 1950, s. 26(b) g

Civil Appeal No: J-02-178-99
For the appellants - Karpal Singh; M/s Karpal Singh & Co
For the respondents - Izzat Abdullah (Rose Zilawati Mohd Arifin with him); M/s Chua Brothers, Azzat & Izzat

Civil Appeal No: J-02-68-99
For the 43 appellants - Karpal Singh; M/s Karpal Singh & Co
For the 160 appellants - Abdul Razak Ahmad (Lim Gek Hui with him); M/s Abdul Haris Norhayati & Co
For the respondent - Izzat Abdullah (Rose Zilawati Mohd Arifin with him); M/s Chua Brothers, Azzat & Izzat h

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- a* Civil Appeal No: J-02-205-99
For the appellants - Abdul Razak Ahmad (Lim Gek Hui with him); M/s Abdul Razak Ahmad & Assoc
For the respondents - Izzat Abdullah (Rose Zilawati Mohd Arifin with him); M/s Chua Brothers, Azzat & Izzat
- b* Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

- c* The narrow issue in these appeals is whether the summary procedure under Rules of the High Court (RHC) O. 89 is available to the respondent before us. The facts relevant to the resolution of this issue are as follows.
- At all material times, a company known as Oakfield Enterprise Sdn Bhd (“Oakfield”) was the registered proprietor of a piece of land held under
- d* 407 separate documents of title. The appellants occupied that land. Oakfield took the view that they were squatters. In late 1989, it commenced proceedings for summary recovery for possession under RHC O. 89. On 8 November 1989, it obtained an order in its favour. Attempts to execute that order proved unsuccessful. So, Oakfield took out committal
- e* proceedings. This was heard by LC Vohrah J, who on 16 December 1991 made an order in favour of Oakfield.
- There was an appeal against that order. The Supreme Court on 6 December 1993 allowed the appeal and discharged the orders made by LC Vohrah J.
- f* Later, in 1994, negotiations took place between Oakfield and the appellants. A firm of advocates and solicitors, M/s J. Singh & Co, represented Oakfield. It is common ground that Mr. J. Singh was also a director of Oakfield. A sum of RM3,000 was collected from each of the appellants as evidenced by the receipts produced in the records made available to us. Despite having obtained an order for possession in its favour, Oakfield did
- g* not, therefore, pursue its claim for vacant possession against the appellants. It would appear from the allegations made by the appellants in their affidavits that they were encouraged to believe that they would receive an interest in the lands in question from Oakfield in return for the payments made by them.
- h* By 1995, Oakfield was in financial straits. A winding-up petition had been presented against it. It obviously wanted to rescue itself from the financial disaster it faced. It decided to sell the land held under the 407 titles.
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On 15 March 1996, the respondents entered into a sale and purchase agreement with Oakfield under which it bought the land in question. The sale was as stated in said agreement as being on an as is where is basis. The respondent took the land without vacant possession and with full knowledge of the presence of the appellants upon it. After obtaining registration of title in its favour, the respondent instituted proceedings for summary recovery of possession under RHC O. 89. *a*

Its application was heard by Zainun J, in the High Court at Johor Bharu. The learned judge held that the appellants were squatters, that this was an appropriate case to be dealt under O. 89 and that the respondent was entitled to an order for possession. She accordingly held in the respondent's favour. It is against that order that these appeals have been brought. *b*

We must pause here to mention that there are in fact three appeals before us. Each appeal is by a different set of the occupiers of the land in question. *c*

Encik Karpal Singh who represents 95 of the appellants has argued that this is not an appropriate case to be dealt with under O. 89. He submits that the case is riddled with triable issues. Among these, counsel has identified the question whether the appellants had acquired an interest in the aforesaid lands and whether that interest binds the instant respondents. Encik Karpal Singh's argument is that the respondent having taken the land with knowledge of the appellants' presence cannot be in a better position than Oakfield. The other question which counsel has identified as constituting a triable issue is whether there is a concluded agreement for the transfer of interest in the aforesaid lands between Oakfield and the appellants. *d*

Encik Abdul Razak Ahmad who appeared for the remaining appellants adopted the arguments of Mr. Karpal Singh. He additionally relied on the possible breach of a fiduciary obligation by Oakfield's solicitor in getting the appellants' to execute certain documents in the course of the negotiations between Oakfield and the appellants. It is Encik Abdul Razak's argument that the weight to be attached to the documents is a matter that must be gone into at a full trial in proceedings commenced by writ and through the employment of *viva voce* evidence. Counsel therefore argued that this was not a case that falls within the summary procedure jurisdiction conferred upon the court by O. 89. *e*

Encik Izzat Othman in responding to the appeals has argued that whatever may be the position between the appellants and Oakfield, the instant respondent is immunised by reason of having acquired an indefeasible title. *f*

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- a* He has argued that *vis-a-vis* his client, the appellants are trespassers with no rights of occupation. He submits that the learned judge was correct in her finding both upon issue of possession and jurisdiction.

- b* After carefully considering the arguments addressed to us by counsel, we are satisfied that there is much force in the submissions advanced on behalf of the appellants. In our judgment, the issues identified by Encik Karpal Singh and Encik Abdul Razak constitute serious triable issues that are wholly inappropriate for resolution under the summary jurisdiction which O. 89 confers.

- c* The position in the instant appeals is adequately covered by high authority. We refer to the decision of the Supreme Court in *Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor* [1991] 1 CLJ 647; [1991] 1 MLJ 343, where it was held the summary procedure under O. 89 is inapplicable to a case in which arguable issues have been raised. It is sufficient for us to cite Mohd Azmi, SCJ in that case:
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- e* In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, of not all, of the farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s. 42 of the National Land Code 1965, and pending issue of titles under s. 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p. 95 of the appeal records reads:
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- h* Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di Rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.

- i* We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O. 89.

Mohamed Azmi, SCJ then went on to state:

In our opinion, for the purpose of summary procedure, *a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over.* It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry unlawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code 1965. (emphasis added.)

In *Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor* [1999] 1 CLJ 74, the Federal Court affirmed the approach that commended itself to the Supreme Court in *Bohari's* case. Zakaria Yatim, FCJ who delivered the judgment of the court on that occasion said:

Similarly in the present case, if the initial entry of the settlers on the said land was unlawful, they had committed an offence under s. 425(1) of the National Land Code. They could also be evicted under O. 89 for being squatters simpliciter. From the evidence the state government knew of their presence on the said land from December 1981. No action was taken to charge them under the National Land Code for illegally occupying the said land. No proceeding was taken to evict them under O. 89. From January 1988 the Menteri Besar knew about the settlers. He approved the renovation of their surau. He knew that the settlers were provided with water supply, roads and a community hall. As stated earlier, **when the land was given to PKNS, it knew about the settlers.** In our opinion there is an arguable case that the settlers occupied the said land with acquiescence of the state authority. (emphasis added.)

In our judgment, the present appeal is a far stronger case than the fact patterns that were before the court either in *Bohari* or *Shaheen*. In the present instance, the appellants, whatever their legal position may have been before 1994, appear *ex facie* to have entered into a transaction with the respondent's predecessor in title. Since the respondent took title with express knowledge, it may be possible for the appellants to argue that the respondent is equally bound by any contract that may have been entered between the appellants and Oakfield. In this context, s. 26(b) of the Specific Relief Act 1950 is relevant. It provides as follows:

- a* Except as otherwise provided under this Chapter, specific performance of a contract may be enforced against –
- (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.
- b* The effect of this section with regard to registered proprietorship of land was considered in *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224. See also, *Krishnadas & Ors v. Maniyam* [1997] 1 CLJ 636; [1997] 1 MLJ 94.
- c* Since the respondent's right to immediate vacant possession is under a cloud for the reasons advanced by Encik Karpal Singh, we are satisfied that the facts in the instant case make it entirely unsuitable to be dealt summarily under O. 89.
- d* For the reasons already given, we hold that there are arguable issues and that accordingly this appeal must succeed. The appeal is allowed and the orders usually consequent upon success will now be made.
- Oral judgment delivered at the conclusion of arguments on 4 April 2000.
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